Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
No. 75-1011

STATE OF ALABAMA ex rel. EUGENE SWEETON,
Chief of Police, City of Huntsville, Alabama

Petitioner,

vs.

GENERAL CORPORATION, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

REPLY AND SUPPLEMENTAL BRIEF

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ON WRIT OF CERTIORARI TO
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REPLY AND SUPPLEMENTAL BRIEF

Pursuant to Rule 24(4) and (5) of the Rules of the Supreme Court of the United States, Petitioner submits the within Reply and Supplemental Brief for the consideration of the members of this Court.

I

THE ALABAMA SUPREME COURT RULING THAT THE ALABAMA RED LIGHT ABATEMENT STATUTE APPLIES TO A THEATER SHOWING OBSCENE FILMS AS A REGULAR COURSE OF CONDUCT WAS A "MAJORITY" DECISION OF THAT COURT.

The manner in which the Respondent has drafted his statement of the case (See Brief for Respondent in Opposition at page 3) suggests that the decision of the Alabama Supreme Court was not a majority decision. If that implication was intended, such is clearly in error. The four Associate Justices in the lead opinion (Associate Justices Almon, Merrill, Faulkner and Emery) and Associate Justice Maddox, who concurred specially, constituted a majority of five.[1/] See General

1. One of the basic postulates of the American case law system is that the decision of a majority determines the result, and an "opinion of the court" is written expressing the reasoning agreed upon by the majority. When a majority agree on the result, the decision is final as between the litigants. When a majority agree in the reasoning for the result, the opinion which expresses this reasoning is called the "opinion of the court." See Wambaugh, The Study of Cases (Second Edition, 1894), at page 50:

> "Even when all the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially. . . . 'There must be a concurrence of a majority of the judges upon

Corporation v. State ex rel Sweeton, 320 So.2d 668 (Sept. 18, 1975). Not only did Justice Maddox agree with the lead opinion that the Alabama Red Light Abatement Act did apply to a theater which engaged in a course of conduct of the type established by the proof at the trial (exhibiting obscene motion pictures, daily, for a continuous period of five weeks, during which period eight films were exhibited, all of which were held to be obscene) but he saw less of a "prior restraint" constitutional problem than did the others. See General Corporation v. State ex rel. Sweeton, 320 So.2d 668 at 679 et seq.

II

THIS COURT MUST ACCEPT THE ALABAMA SUPREME COURT'S CONSTRUCTION THAT THE ALABAMA RED LIGHT ABATEMENT STATUTE APPLIES TO A THEATER SHOWING OBSCENE FILMS AS A REGULAR COURSE OF CONDUCT.

Respondent's argument, at page 10 of its Brief in Opposition, that:

> "Traditionally, the nuisance has been applied to prostitution, gambling and liquor

> the principles, rules of law, announced in the case, before they can be considered settled by a decision.' "

and it should not be applied to motion picture theaters under this general nuisance law adopted by the State of Alabama..."

is inapposite to the petition for writ of certiorari herein. A majority of the justices on the Alabama Supreme Court having held that the Red Light Abatement Act was applicable, this Court must accept that state court's construction of the Alabama Legislature's language, and proceed to test its validity on that basis. Kingsley Pictures Corporation v. Regents, 360 U.S. 684, 688, 3 L.Ed.2d 1512, 1516, 79 S.Ct. 1362 (June 29, 1959).

Petitioner submits that the real question is not whether the statute should be applied to a theater showing films, but whether the statute is being applied in a constitutional manner, and whether the proof which was tendered at the trial overcame the first amendment presumption regarding "protected materials", customarily afforded motion picture films. To answer that question, this Court need only look to the trial facts and make its own determination that a first amendment problem does not exist, except as to the right of the Alabama legislature to apply a "padlock" penalty.

III

RESPONDENT'S CONTENTION THAT THE PETITION HEREIN RAISES SUBSTANTIAL FEDERAL QUESTIONS BEYOND THAT OF THE CRITICAL PADLOCK PENALTY, FLIES IN THE FACE OF THIS COURT'S RECENT RULING IN ART THEATER GUILD, INC. ET AL. V. CLARK L. EWING.

At the "conclusion" to its Petition for a Writ of Certiorari, Petitioner argues that:

"the procedural aspect of this case identifies it as an ideal vehicle for resolving this critical (padlock penalty) issue."[2/]

See petition at page 53 and footnote 3, page 54. In support of this conclusion, the Petition cites a number of cases involving the public nuisance approach to obscenity, which have appeared on this Court's docket in past terms,

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2. The Alabama Supreme Court has ruled that the State Statute applies to the specific type of lewd conduct placed in evidence at the trial. The State Legislature has expressed its intention that where the statute does apply, a one year padlock penalty must be assessed against the leasehold, and has authorized repossession of the leasehold if specific redemption procedures are followed. The federal issues are: (1) has the Alabama State Legislature violated any first amendment "Prior Restraint" principles heretofore expressed by this Court and (2) has the Alabama State Legislation exceeded its governmental powers under the Tenth Amendment of the Bill of Rights?

(Petition, pages 21-27) and thereafter states at page 26:

> "A review of the files in the above appeals will demonstrate that, in none of these cases, has the critical 'padlock' issue of the Red Light Abatement Act been drawn as clearly in focus. With the single exception of the constitutional issue as to whether the 'padlock' penalty constitutes a 'prior restraint' in violation of the First Amendment, the decision of the Alabama Supreme Court below upheld the petitioner's claims on all of the trial issues involving the Red Light Abatement Act, including those State issues involving statutory construction."

In its Brief in Opposition, Respondent disputes Petitioner's claim that the "padlock" penalty is the only issue, and argues at page 8:

> "The Alabama Red Light Abatement Statute raises a number of issues and would not allow the critical padlock issue only to be decided by this Court...";

and at page 9:

> "Respondent contends that the consideration by the Court of the Alabama Red Light Abatement Statute would not be limited to one critical padlock issue.

> If the Court considered this statute, it should consider its various provisions as well as its applicability to motion pictures at all... Among these issues would be the following..."

Thereafter, Respondent catalogues, at pages 9 and 10, six additional questions, which Respondent contends are "Substantial Federal Questions" to be considered on this appeal.

In reply, Petitioner submits that the above stated claims of the Respondent have already been rejected by this Court's decision in Art Theater Guild, Inc. et al. v. Clark L. Ewing, ___U.S.___ 44 L.Ed.2d 82, ___S.Ct.___ (April 21, 1975), appeal dismissed for want of a substantial federal question. All of the Respondent's claims were raised and rejected by the pronouncement of this Court in the Art Theater Guild case. The Alabama Red Light Abatement Act is virtually identical to the Ohio Red Light Abatement Act which was considered in that case.

In Hicks v. Miranda, __ U.S.__, 45 L.Ed.2d 223, 95 S.Ct. __ (June 24, 1975) this Court resolved a longstanding dispute as to the significance of its dismissal "for want of a substantial federal question," at page 236:

> "We agree with appellants that the District Court was in error in holding that it could disregard the decision in Miller

II. That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under s1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement. As Mr. Justice Brennan once observed '(v)otes to affirm summarily and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . .' Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247, 3 L.Ed.2d 1200, 79 S.Ct. 978 (1959); compare Stern & Gressman, Supreme Court Practice, Fourth Ed, p. 197 ("The Court is, however, deciding a case on the merits,

when it dismisses for want of a substantial question..."); Wright, Law of Federal Courts, 2d Ed, p.495 ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits.") The District Court should have followed the Second Circuit's advice, first in Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F.2d 259, 262 n 3(1967), that 'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial it remains so except when doctrinal developments indicate otherwise'; and later in Doe v. Hodgson, 478 F.2d 537, 539 (1973), cert denied, 414 U.S. 1096, 38 L.Ed.2d 555, 94 S.Ct. 732 (1974), the lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.' "

In Hicks, this Court noted, at page 236, footnote 14, that when a claim is made that a summary dismissal of a previous appeal is dispositive of the constitutional issue presented in such appeal, the initial task is to ascertain what

issues had been properly presented in such appeal and declared to be without substance. See also Colorado Springs Amusement Ltd. v. Rizzo, 524 F.2d 571 at 575-577 (Oct. 16, 1975). The Jurisdictional Statement in Art Theater Guild Inc. et al. v. Ohio ex rel. Clark L. Bwing, No. 73-1973 listed 13 alleged defects. A copy of pages 1-32 of Appellee's Motion to Affirm in that case, setting forth arguments responding to those 13 alleged defects, is attached to this brief as Appendix A1-32.

It must further be observed that General Corporation has not seen fit to petition this Court for a review of those constitutional issues which were decided against General Corporation in the Alabama Supreme Court. Were this Court not to grant a review in this Petition, General Corporation should not thereafter be permitted to seek review of the federal issues which were decided by the Alabama Supreme Court adverse to their interests---particularly those which were decided in Art Theater Guild Inc., supra, since it has not seen fit to affirmatively seek relief in this Court from those rulings.

The answer to Respondent's suggestion at page 7 of the Brief in Opposition that:

> "a more likely candidate for consideration by this Court dealing with the applicability

> of a nuisance statute made specifically applicable to motion picture theaters is a decision of a three-judge court in Texas in Universal Amusement Co. Inc. v. Vance, 404 F.Supp. 33 (July 1975)"

can be found in a casual reading of the three-judge court opinion, and the statement of facts in the Jurisdictional Statement in Ted Butler and Emil Peters et al. vs. Richard C. Dexter, No. 75-623, one of the many appellate attacks on that three-judge court decision. There may be less complex federal cases in the nuisance area than Butler v. Dexter, supra, but this Petitioner knows of none. The probability of getting to the padlock penalty issue in the Universal Amusement Co., Inc. appeal is even more remote that that which was presented on the appeal in Huffman et al. v. Pursue Ltd., ___U.S.___ 43 L.Ed.2d 482, ___S.Ct.___ (Mar. 18, 1975). (See, in this regard, the Petition for Writ of Certiorari, herein, at page 54, footnote 3).

IV

THE RECENT DECISION OF THE CALIFORNIA SUPREME COURT UPHOLDING THE APPLICATION OF THE CALIFORNIA PUBLIC NUISANCE LAWS TO OBSCENITY, BUT DEFERRING TO THIS COURT ON THE QUESTIONS OF THE PADLOCK PENALTY AND AN INJUNCTION AGAINST FUTURE EXHIBITIONS, UNDERSCOKES THE SUBSTANTIAL NATURE OF THIS FEDERAL QUESTION.

In the Petition for a Writ, Petitioner presented the following argument at page 26:

> "The merits of the public nuisance approach, and the critical question as to whether or not the 'padlock' penalty of the Red Light Abatement Act is in derogation of federal rights, are 'burning' issues in a number of other states. See Busch et al. v. Projection Room Theater et al., 118 Cal.Rptr. 428 (Dec. 27, 1974) hearing granted on March 10, 1975 in L.A. No. 30518 and argued to the California Supreme Court on June 18, 1975... A timely decision by the Court on the critical issue in this case will obviate a great deal of additional litigation on the same issue in other state and federal courts."3/

3. See New York v. O'Neill, 359 U.S. 1, 3 L.Ed. 2d 585, 79 S.Ct. 564 (Mar. 2, 1959) where this Court, in granting certiorari, noted at page 587:

> "The Circuit Court, ruling that the Florida statute violated the Florida and the United States Constitutions, refused to grant New York's request. 9 Fla.Supp. 153. The Supreme Court of Florida affirmed this decision on the ground that the statute violated the United States Constitution. (Fla) 100 So.2d 149. We granted certiorari, 356 U.S. 972, 2 L.Ed.2d 1146, 78 S.Ct. 1137, inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico." (Our emphasis)

Subsequent to the filing of the Petition, the California Supreme Court decided the Busch case, upholding the application of the California Public Nuisance Statute to obscenity (porno theater and porno book stores) People ex rel. Busch et al. v. Projection Room Theater et al., ___Cal. 3d___(Mar. 4, 1976). A copy of the Busch decision is attached to this Brief at Appendix B. Because the proceedings in Busch were at a pleading stage and the cases were being remanded for trial, the California Supreme Court, after acknowledging the fact that this Court has not yet spoken on the padlock issue, deferred on that critical issue and left the matter open for further consideration. See Appendix B, herein, at page B-25 where the California Supreme Court ruled:

> "We express no opinion upon the further question whether the court may, in addition, either close the premises entirely or enjoin

further 'obscene' exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible. (See People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App.3d 556, 562-563; Bloss v. Paris Township, supra, 157 N.W. 2d 260; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578-580; Oregon Bookmark Corporation v. Schrunk (D. Ore. 1970) 321 F.Supp. 639; State ex rel. Cahalan v. Diversified Theat., supra, 299 N.W.2d 389, 396-397; United Theatres of Florida, Inc. v. State ex rel. Gerstein (Fla. Ct. App. 1972) 259 So.2d 210, 212-213, vacated and remanded, 419 U.S. 1028.) Other cases have held that such relief would constitute an invalid prior restraint of presumptively protected materials (Gulf States Theatres of Louisiana, Inc. v. Richardson (La. 1973) 287 So.2d 480, 489; Mitchem v. State ex rel. Schaub (Fla. 1971) 250 So.2d 883, 886-887; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; Sanders v. State, supra, 203 S.E.2d 153, 156-157; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Ewing v. 'Without A Stitch', supra,

307 N.E.2d 911, 917-918.) Since the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration."

The reluctance of the majority of the California Supreme Court to hand down a ruling in this area, absent a policy decision from this Court, is but another example of a major stumbling block which is preventing local communities in Alabama, California, and elsewhere in the 50 states, from developing a "public nuisance" solution to this social problem---a compelling need of nation-wide significance. See, for example, People ex rel. Camil v. Buena Vista Cinema, petition for a writ of certiorari to the Court of Appeal, Second Appellate District, filed in this Court on Dec. 7, 1975 in No. 75-820, cert denied by this Court on March 1, 1976.4/

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4. On June 18, 1974, the Buena Vista Cinema commenced showing hard-core pornographic films ("Deep Throat" and "Devil In Miss Jones") at a shopping center in Duarte, California (Population 14,000). Under prevailing principles of constitutional law on "prior restraint", as presently interpreted by this Court, See Southeastern Promotions Ltd. v. Conrad ___U.S.___, 43 L.Ed.2d 448, 458 95 S.Ct.---(Mar. 18, 1975))

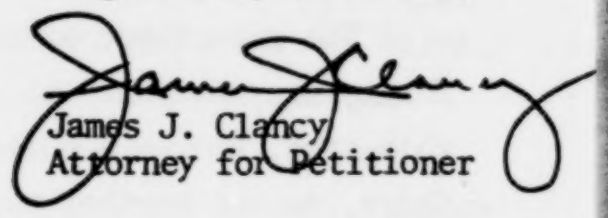
(footnote continued on next page)

CONCLUSION

The Writ of Certiorari should be granted as prayed for.

Dated: March 17, 1976

Respectfully Submitted,



James J. Clancy
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the City was powerless to prevent the licensing and exhibition of such lewd films (Petition for Writ of Certiorari in People ex rel. Camil v. Superior Court and Buena Vista Cinema, No. 75-820 at "Statement of Facts" pages 5-34). As of the time of filing the Supplemental and Reply Brief herein, the Buena Vista Cinema has, in two years, exhibited 72 consecutive programs of hard-core films (approximately 144, one hour hard-core pornographic films) and is presently exhibiting "Deep Throat" and "Devil In Miss Jones" as reruns. (See Los Angeles Times for Mar. 16, 1976 at Adult Movie Advertisement on page 8). Multiply this example by ten thousand, and the importance of this "Federal Question" begins to take shape and come into proper focus.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March 1976, copies of the within Reply and Supplemental Brief were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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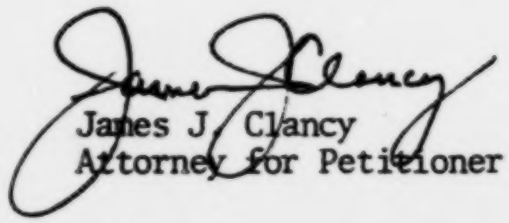

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APPENDIX A

Pages 1 - 32 of Appellee's Motion To Affirm on File in this Court in Art Theater Guild, Inc., et al. v. Ohio ex rel. Clark L. Ewing, No. 73-1973. See Art Theater Guild, Inc. et al. v. Ohio ex rel. Clark L. Ewing, ___, U.S. ___, 44 L.Ed.2d 82, ___ S.Ct. ___, (April 21, 1975) appeal dismissed for want of a substantial federal question.

(See page 10 herein) . . . . . A-1 to A-32

Supreme Court of the United States

No. 73-1973

October Term, 1974

ART THEATER GUILD, INC., *et al.*,
Appellants,

vs.

STATE OF OHIO *ex rel.*, CLARK L. EWING,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO AFFIRM

The Appellee, State of Ohio ex rel. Clark L. Ewing moves to affirm the judgment of the Supreme Court of Ohio pursuant to Rule 16(1)(c) of the United States Supreme Court.

That the public nuisance laws may be used to abate the public exhibition of an obscene motion picture film has already been decided by this Court in a series of obscenity cases on review from the state of Georgia. See Evans Theatre Corp. et al. v. Slaton, District Attorney of Fulton County, 227 Ga. 377, 180 S. E. 2d

712 at 716 (Mar. 4, 1971) wherein the Georgia Supreme Court upheld a civil injunctive action as to the film "I Am Curious (Yellow)" on "public nuisance" grounds. Cert. denied in Evans Theatre Corp. et al. v. Slaton, District Attorney of Georgia, 404 U.S. 950, 30 L. Ed. 2d 267, 92 S. Ct. 281 (Nov. 9, 1971). The Evans Theatre Corp., supra, abatement procedure was followed in Slaton v. Paris Adult Theatre I, 185 S. E. 2d 768 at 768 (Nov. 5, 1971) and approved by this Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L. Ed. 2d 446 at 455, 93 S. Ct. 2628 (June 21, 1973). See, also, Slaton v. Paris Adult Theatre I, 201 S. E. 2d 456 (Oct. 30, 1973), cert. denied in Paris Adult Theatre I v. Slaton, ___U.S.___, 41 L. Ed. 2d 1173, ___S. Ct. ___ (July 25, 1974).

The views of this Court on the seizure of obscene materials as contraband and their forfeiture as such are clearly stated in U.S. v. Reidel, 402 U.S. 351, 28 L. Ed. 2d 813, 91 S. Ct. 1410 (May 3, 1971), U.S. v. Thirty Seven (37) Photographs, 402 U.S. 363, 28 L. Ed. 2d 822, 91 S. Ct. 1400 (May 3, 1971). See, also, Kingsley Book Inc. v. Brown, 354 U.S. 436, 441 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (June 24, 1957). The power to declare forfeitures as to the instrumentalities of the crime has been fully litigated

in a series of cases recently decided by this Court. U.S. v. U.S. Coin and Currency, 401 U.S. 715, 28 L. Ed. 2d 434, 91 S. Ct. 1041 (Apr. 5, 1971), One Lot of Emerald Cut Stones and One Ring v. U.S., 409 U.S. 232, 34 L. Ed. 2d 438, 92 S. Ct. 489 (Dec. 11, 1972), Astol Calero-Toledo v. Pearson Yacht Leasing Co., ___U.S. ___, 40 L. Ed. 2d 452, ___S. Ct. ___ (May 15, 1974).

Statement of the Case.

The film "Without A Stitch" opened at the Appellant Westwood Art Theater in Toledo, Lucas County, Ohio, on July 17, 1970.

Appellant Westwood Art Theater is operated by Appellant Art Theatre Guild, Inc., an Ohio Corporation, under a lease from the owner of the premises. Appellant Art Theatre Guild, Inc. (wholly owned by Louis K. Sher, a California resident) has a wholly owned subsidiary (Sherpix, Inc., an Ohio Corporation) which, in turn, owns the right to 50% of the proceeds received from the exhibitions of the film "Without A Stitch" in the State of Ohio and throughout the United States. Appellant Tonylyn Productions, Inc. owns the remainder of the rights for exhibitions in the United States (Jurisdictional Statement at page 52.)

On August 10, 1970, Appellee Clark Ewing, a private citizen residing in Lucas County, Ohio, brought this action in the Court of Common Pleas of Lucas County, Ohio, in the name of the State of Ohio, under the authority of Section 3767. 01, et seq., of the Ohio Revised Code, for the purpose of securing a temporary and permanent injunction to prevent the exhibition of the picture "Without A Stitch" in the State of Ohio, and for an accounting of the box office receipts, which he prayed be forfeited to the State of Ohio, all on the theory that the film constituted a public nuisance, as defined by O. R. C. Section 3767. 01, et seq.

Under Ohio precedure, the defendant in such matters has the option of consolidating the hearing on the temporary injunction with the trial on the merits for the final injunction. The hearing for a temporary injunction was consolidated with the hearing on the merits which came on for trial commencing on Aug. 25, 1970.

The film is in Danish with English subtitles and lasts 96 minutes. See Continuity for "Without A Stitch" at Appendix A and B to this Motion to Dismiss. The Westwood Art Theater followed the instructions of the distributor that no persons under 18 were to be admitted. The theater is a closed, or "hard top" theater, not a

drive-in.

The trial was conducted without a jury. The judge viewed the film. The appellee testified and also called as a witness Dr. Anders Otterland, a medical school professor, who testified that the dominant theme of the movie was to exhibit different forms of sexual deviation, variations, variances (Transcript, vol. IV, p. 84); that the film had no social value (p. 90); that the depiction of the doctor's role in the movie was utterly unrealistic (p. 94); and that the doctor in the movie was "comiting an ethical crime"(p. 94); that he "couldn't think of any doctor that would teach a young girl in his office to make sexual intercourse" and that it was "utterly unrealistic"(p. 96); that, based upon his experience as a doctor in the sex education bureau, the progression which the girl goes through and her reactions to them was not realistic (p. 96); that the film was not a true depiction of the nature of female sexuality (p. 97); and that such an incorrect description of female sexuality has a corruptive effect on society as a whole. (p. 97)

A continuity of the film "Without A Stitch", attached as Exhibit "C" to the complaint, was admitted into evidence as plaintiff's exhibit 4 (Transcript, vol. IV, p. 99). The continuity of the film "Without A Stitch"appears herein at Appendix"A".

Appellants called three witnesses, Dr.

Frank A. Hoffman, an alleged expert on erotic art and folklore; Louis M. Pesce, former New York state film censor, and presently advisor to the film industry; and Dr. Michael Greicus, an English professor.

On September 16, 1970, the Court of Common Pleas found the film to be obscene and filed 14 findings of fact and 11 conclusions of law (Jurisdictional Statement at pages A51-57.) The order entered by the trial court reads as follows (Jurisdictional Statement at page A58):

COURT ORDER

The Court, therefore, finds that the Plaintiff is entitled to an order permanently enjoining the Defendants, each and all of them and all persons acting by, through, under, or in concert with them, from exhibiting the motion picture film entitled "Without A Stitch" in the State of Ohio. And said permanent injunction is to issue and become effective three days from the date of the filing of this order unless the defendants jointly or any one of them, deposit an appeal bond in the amount of $20,000.00 to stay execution until final adjudication in the Appellate Courts of this State.

The question of forfeiture as prayed for in the petition is stayed, pending final adjudication.

That the Defendants are to pay the costs herein.

NICHOLAS J. WALINSKI, Judge

Appellants elected to continue exhibiting the film at the Westwood Art Theater and deposited an appeal bond in the amount of $20,000.00 to stay execution.

An appeal on law and fact was taken to the Lucas County Court of Appeals from the trial court's judgment. Under the now abandoned Ohio practice, such an appeal could be taken in certain classes of cases, and the appeals court heard the case de novo on the record below and on additional evidence. The only additional evidence heard went to establish the procedure for barring juveniles from the theater during the run of this picture.

The Court of Appeals made its own findings of fact and concluded, in its opinion (Jurisdictional Statement at pages 31-48) that the film was obscene and should be permanently enjoined from exhibition in the State of Ohio. In addition, the Court of Appeals held that all of the remedies contained in Chapter 3767 of the Revised Code were mandatory and accordingly ordered the theater closed for a year, assessed a Three Hundred ($300.00) Dollar tax and ordered an accounting of the box office receipts from the date of the final order of the Court of Common Pleas through the final performance. One of the three judges of the Court of Appeals concurred on the granting of the permanent injunction and the

other relief, but dissented from that part of the judgment which ordered an accounting of the box office receipts.

An appeal was then taken to the Ohio Supreme Court. That Court agreed to hear the case but limited its review to questions concerning the Ohio Nuisance Statute. The Ohio Supreme Court refused to review the question of the obscenity of the film.

On February 27, 1974, the Ohio Supreme Court announced its decision, reported at 37 Ohio St. 2d 95 sub. nom. State ex rel. Ewing v. Without A Stitch. In its decision, the Ohio Supreme Court modified the judgment of the Court of Appeals in that it permitted an accounting of net profits only from the time of the original injunction. It held that the statute did not permit forfeiture of box office receipts. It further held that although the theater could be closed for a year, the theater could remain open if the owner of the real estate proved to the satisfaction of the Court his good faith and complied with the release provisions of R. C. 3767. 04. In this regard, the Ohio Supreme Court stated (Jurisdictional Statement at page A11):

> "The fourth remedy is also contained in R. C. 3767. 06. One part of the statute dictates that the abatement order include an order closing the place, in and upon which the nuisance was maintained,

> for a period of one year. R. C. 3767. 06 states that the closing pertains to the use of the property "for any purpose." However, this harsh penalty is ameliorated by permitting the owner to obtain a release from the order by complying with the release provisions of R. C. 3767. 04. Those provisions require that the closing order must be released if the owner appears in court, pays the costs incurred in the action, files a bond in the full value of the property, and demonstrates to the court that he will prevent the nuisance from being reestablished."

ARGUMENT.

I.

The Ohio Nuisance Statute (R.C. Section 3767.01 et seq.), as Applied by the Ohio Courts to the Trial Facts Herein, Is a Constitutionally Permissible Means of Controlling Obscenity.

In their attack on the Ohio Nuisance Statutory scheme, as interpreted by the highest court in the State of Ohio, Appellants list thirteen alleged defects of constitutional dimension, five of which were not considered by the Ohio Supreme Court in its opinion, and are unrelated to the facts on appeal herein. (See second, fifth, tenth, twelfth, and thirteenth grounds appearing at pages 8, 9, 11, and 12 of the Jurisdictional Statement.) Appellee submits that under rudimentary principles of constitutional law the latter five claims are not properly before this court. Appellants are limited in their attack on the constitutionality of the statute to the specific manner in which the statute was applied in this case. They cannot complain that in the future other sections may be unconstitutionally applied to others: See United States v. Raines, 364 U. S. 17, 21 (1960):

> "Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to

other persons or other situations in which its application might be unconstitutional."

The reasonableness of the above-limiting rule of constitutional law is evident when one considers Appellants' second alleged defect which reads as follows:

> Second, Section 3767.01 describes only obscene films as nuisances subject to the penalties of the statute, but not books, magazines or pictures of similar character or content. Such a classification is both an arbitrary denial of substantive due process and equal protection of the laws guaranteed by the Fourteenth Amendment. See Yick Wo v. Hopkins, 118 U.S. 356 (1886)."

The impropriety of considering the issue of arbitrary classification, based upon an assumption that "books, magazines or pictures of similar character or content" are not subject to the penalties of the statute, is apparent when one considers that said statute has already been given a contrary interpretation by the Ohio trial courts (that is, to subject such subject matter to the statute) and, less than five months ago, such interpretation was sustained by a three-judge federal district court in Cincinnati. See Cincinnati Properties Inc. et al. v. Simon Leis et al., Civil Action No. 8471, In the United States District Court for The Southern District of Ohio,

Western Division, decided May 2, 1974, a copy of which appears herein at Appendix "C".

A. FIRST ALLEGED DEFECT.

The first alleged defect, based upon overbreadth, is answered by the Ohio Supreme Court in its opinion below. See State ex rel. Ewing v. A Motion Picture Film Entitled "Without A Stitch" et al., 37 Ohio St. 2d 95, 307 N.E. 2d 911 at 914:

> "First, appellants allege that the definition of nuisance contained in R.C. 3767.01(C) is overbroad. In essence, the statute states that any place which exhibits filmed obscenity is a nuisance, and this court has held that only activity which violates R.C. 2905.34 and R.C. 2905.35 constitutes a "nuisance" within the meaning of R.C. 3767.01(C). State ex rel. Keating v. Vixen, supra, (27 Ohio St. 2d 278, 272 N.E. 2d. 137). Upon remand of the Vixen case from the United States Supreme Court, this court also held (35 Ohio St. 2d 215, 301 N.E. 2d 880) that the definition of obscene material contained in R.C. 2905.34 comports with the constitutional definition of the word "obscenity" as enunciated in Miller v. California (1973), 413 U.S. 15, 93 S.Ct. 2607, 37 L. Ed. 2d 419. Since an obscenity-nuisance abatement action under R.C. 3767.01 et seq. is limited to the exhibition of obscene material as defined in R.C. 2905.34, and since R.C. 2905.34 is not overbroad, if follows that the definition of nuisance contained in R.C. 3767.01(C) is not overbroad."

Appellant's claim of overbreadth is "old hat" to obscenity litigation involving obscenity statutes which employ "specificity". See the trial court's decision in Adams Newark Theatre Co. v. Newark, 120 A.2d 496 at 499 (Feb. 7, 1956) which upheld appellants' contention herein, but which, in turn, was unanimously reversed by the New Jersey Supreme Court in Adams Newark Theatre Co. v. Newark, 126 A.2d 340 with that Court remarking at page 343:

> "The municipality is thus faced with a constant dilemma. If it employs broad language, such as 'lewd, obscene or indecent,' the defense contends the accusation is so vague and general as not to apprise the defendants of the particular case to be met. While, if the information which would undoubtedly be demanded under those circumstances is put into the ordinance itself for clarification, it is said to become a trespass upon the constitutional protection of free speech."

It should be of particular interest to this Court that, on the same date that it upheld Roth-Alberts 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957) the Roth-Alberts Court also affirmed the judgment of the New Jersey Supreme Court in a 5-3 per curiam opinion in Adams Newark Theatre Co. v. Newark, 354 U.S. 931, 1 L.Ed.2d 1533, 77 S.Ct. 1395 (June 24, 1957).

Appellants claim that language appearing

in R.C. Sections 2907.01(F)(2) and 2907.01(F)(5) is vague, namely "in a way which tends to represent human beings as mere objects of sexual appetite" and appeal to prurient interest "for its own sake" for "commercial exploitation" rather than for a "genuine . . . moral . . . purpose" must fail for the same reason.

B. THIRD ALLEGED DEFECT.

The third alleged defect (Jurisdictional Statement at page 8) which attacks the trial court's power, sitting as an Equity Court, to issue a temporary injunction upon a standard of proof "to the satisfaction of the court or judge" was not properly raised in the state court. See Whitney v. California, 274 U.S. 357, 362-363; Supreme Court Practice by Stern and Gressman, Fourth Edition at page 131. No mention was made of it in either the trial court, the Court of Appeal, or the Supreme Court of Ohio and that issue is not properly before the Court in this Appeal.

Appellants' assertion under their third claim that a temporary injunction can be issued under the statute "without hearing evidence" is contradicted by the plain language of the statute and the ruling of the Ohio Supreme Court. See State ex rel. Ewing v. "Without A Stitch", supra,

at page 914:

> "Under R. C. 3767. 01 et seq., the earliest point in time when the exhibition of a film may be enjoined is upon the granting of a temporary injunction. However, a temporary injunction can only be issued after a judicial hearing at which all the parties can present evidence on the allegation of obscenity. "(our emphasis)

The ex parte restraining order authorized by R. C. Section 3767. 04:

> "restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon . . . ."

is not an injunction against exhibition. Rather, it is an exercise of the subpoena power of the court. See Grove Press, Inc. v. Flask, 326 F. Supp. 574, at 579; Walter v. Slaton, 182 S. E. 2d 464, 467 (May 13, 1971); Go v. Peterson, 480 P. 2d 35, at 36 (Feb. 1, 1971); and U. S. v. Little Beaver Theatre, Inc., 324 F. Supp. 120, 121 (Jan. 15, 1971). In any event, such ex parte restraining order was not issued by the trial court below, and such matter is not properly before this Court. United States v. Raines, supra.

The assertion under the third claim (Jurisdictional Statement at page 8) that "serious issues of prior restraint and inhibition of distribution of protected materials are presented by the interlocutory powers given the trial court by this statute" are completely without merit. See U. S. v. 37 Photographs, 402 U. S. 363, 91 S. Ct. 1400, 28 L. Ed. 2d 822, at pages 830-833 (May 3, 1971), which authorizes actual prior restraints for a reasonable period of time in advance of a final determination of the obscenity issue by the trial court (not in issue here) in Federal Customs cases.

That the judicial restraint may be applied after an adversary hearing at the preliminary injunction stage does not raise any additional procedural issues for, as authorized by Civil Rule 65(B)(2), the Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. The defendant in such matters has the option of consolidating the hearing on the temporary injunction with the trial on the merits for the final injunction, and such did occur in the trial court below: See Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 914:

> "R. C. 3767. 04 provides for the filing and disposition of an application for a

temporary injunction. The appellee did file such an application in this case. R.C. 3767.04 also requires that the application for a temporary injunction be heard within ten days of filing, and that all defendants be served with the complaint and notice of the time and place of hearing on the application for a temporary injunction at least five days before the hearing. In the present case, the application for a temporary injunction was filed on August 10, 1970, and a hearing was scheduled for August 19, 1970. However, on the hearing date the court continued the hearing until August 25, 1970, and consolidated that hearing with a hearing on the merits of issuing a permanent injunction."

The Ohio procedures are well within the boundaries set by this Court in U.S. v. 37 Photographs, supra. See Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 914, where the Ohio Supreme Court noted:

"R.C. 3767.05 provides that a nuisance abatement action "shall have precedence over all other cases except crimes, election contests, or injunctions." In this case, a three-day hearing, commencing August 25, 1970, was held. It resulted in the issuance of a permanent injunctive order on September 16, 1970. The application for the temporary injunction was dismissed.

At this point, it should be noted that R.C. 3767.01 et seq., do not provide for or allow censorship of films prior to a judicial determination of obscenity. Therefore, the United States Supreme Court decisions, such as Freedman v. Maryland,

(1965), 380 U.S. 51, 85 S.Ct. 734, 13 L. Ed. 2d 649, and Teitel Film Corp. v. Cusack (1968), 390 U.S. 139, 88 S.Ct. 754, 19 L. Ed. 2d 966, which specify the constitutional requirements of such a system, are not applicable."

C. FOURTH ALLEGED DEFECT.

The fourth alleged defect (Jurisdictional Statement at page 8) which suggests that, under the statute, an owner of the premises may be penalized "without proof of his guilty knowledge" and that there is a "shifting of the burden of proof of scienter" from the complaining party to the real estate owner is contradicted by the opinion of the Ohio Supreme Court. See Ohio ex rel. Ewing v. "Without A Stitch" at page 916; where the court stated that no individual could be penalized under the statute unless it was shown that such person had knowledge of the content of the film declared to be obscene:

"The exhibition of films is an activity normally protected by the First and Fourteenth Amendments. Kingsley International Picture Corp. v. Regents (1959), 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512, R.C. 3767.01 et seq. penalize persons engaged in the exhibition of obscene films in that R.C. 3767.06 requires that all personal property used in conducting the nuisance be sold and R.C. 3767.08 imposes a tax of three hundred dollars upon persons maintaining the nuisance and upon the theater and the real property on which

it is located. Therefore, those penalty provisions can be imposed only if the persons upon whom they are sought to be imposed had knowledge of the content of the film declared to be obscene.

This requirement of scienter is not novel. In State ex rel. Keating v. Vixen, supra (27 Ohio St. 2d 278, 285, 272 N.E. 2d 137), this court held that a film constitutes a nuisance which can be enjoined pursuant to R.C. 3767.01 et seq. only if scenes in the film violate R.C. 2905.34 and 2905.35. R.C. 2905.35 expressly requires knowledge of the contents of the film on the part of any person against whom that statute is sought to be invoked. Therefore, no individual can be penalized under R.C. 3767.01 et seq. for maintaining a theater in which an obscene film is exhibited unless it is shown that that person knew of the contents of the film. In the present case, none of the appellants contended upon appeal that he did not have knowledge of the contents of the film." (our emphasis.)

Further, the opinion of the Ohio Supreme Court made it clear that the burden of proof under the obscenity-nuisance abatement action is on the complaint. See Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 916:

> "Appellants' third reason for asserting that R.C. 3767.01 et seq. are unconstitutional is the allegation that those statutes place the burden of proving that a film is not obscene upon the exhibitor. It is settled that in areas generally protected by the First Amendment, the state must shoulder the burden of proving that the particular activity complained of is outside the scope of constitutional protection. Freedman v. Maryland, supra, (380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649); Speiser v. Randali (1958), 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460. However, R.C. 3767.01 et seq. do not place the burden of proof upon the defendants in an obscenity-nuisance abatement action. Since the statutes are silent on this point, the general rule, that the burden of proof is on the complainant, is applicable."

D. SIXTH ALLEGED DEFECT.

The sixth alleged defect pertains to R.C. section 3767.06 and the procedures which govern the final hearing on the merits. Appellants note that such procedures are the same as those employed at the hearing on the temporary injunction, and that the sixth claim is a duplication of other claims previously described.

E. SEVENTH ALLEGED DEFECT

Appellants' seventh alleged defect reading:

> ". . . the closing of a theater for a year prevents it, during that period, from exhibiting any film, whether or not sexually oriented, whether or not protected by the First Amendment and whether or not previously adjudged to be obscene in a court of law. That such a result, after the adjudication of obscenity of one film, under the questionable standards and procedures provided by this statute, raises implications. of prior restraint of the most serious kind."

is the same argument which was successfully urged upon the three-judge federal district court in Pursue Ltd. v. Huffman et al., as to which jurisdiction was noted by this Court in Huffman et al. v. Pursue Ltd., No. 73-296, ___U. S. ___, 39 L. Ed. 2d 870, ___S. Ct. ___ (Mar. 18, 1974). In that case, the federal district court enjoined the enforcement of a Lima, Ohio Common Pleas Court judgment which had padlocked a theater based upon a course of conduct involving the exhibition of 16 obscene motion picture films over a period of several months. Appellants herein filed a copy of said opinion of the three-judge federal district court in Pursue Ltd. v. Huffman et al., supra, with the Ohio Supreme Court, well in advance of its decision herein. In holding as it did in this case, the Ohio Supreme Court must be understood to have rejected the reasoning upon which the Pursue Ltd. decision was based.

Two months after the decision of the Ohio Supreme Court herein, the United States District Court for the Southern District of Ohio, Western Division, handed down an opinion wherein it considered the same issue, applied a different analysis, and came to a conclusion different from that of the three-judge federal district court in Pursue Ltd. v. Huffman, supra.

In Cincinnati Properties Inc. v. Simon Leis, (See copy of opinion at Appendix "C" at pages C-8 to C-11) the three-judge court (Peck, Porter, and Hogan) stated:

> "The plaintiffs' constitutional argument is this: A person is operating a book store containing a thousand different items each concededly presumptively protected by the First Amendment - a fair sampling of the 1,000 produces 50 which are subsequently the subject of an adversary judicial proceeding and found to be obscene. Any state remedy applied to the facts which prevents the operator from staying in business at that location and selling the other non-judicially examined materials is a prior restraint on the sale of those materials and therefore violates the First Amendment. We do not agree. The argument overlooks the right of the State, within constitutional bounds, to declare or define public nuisances and abate them. . . . The falacy of the plaintiffs' position is somewhat indicated by this simple example: A person possessing for sale one copy of one book concededly obscene and ten copies of a concededly non-obscene book is imprisoned for the former - during the term of imprisonment he is effectively stopped from dealing in non-obscene materials. Surely it would not follow that the imprisonment was unconstitutional because it was a prior restraint respecting the innocent materials.
>
> "From time immemorial states have chosen, in the exercise of their police power, to define certain action as illegal and, in addition, to define the place where certain prohibited activity is carried on as a

"nuisance". The attendant remedy provided in such nuisance cases has been one against the place in which the activity has been carried on. This record is clear that the business of selling books and materials and offering shows was being carried on in the involved locations (see, for instance, the hundreds of publications contained in the "Inventory" involved in No. 8714 (copy of the state court record attached to defendant Conroy's motion for summary judgment.)) No one questions that the sampling was a fair one and that sampling produced what is 100%, on this record, illegal and unprotected obscenity.

"The State of Ohio has seen fit to define as a nuisance, subject to abatement, a place in which obscenity is conducted. There being no question of fact that a business of obscenity was carried on, the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year - padlock it - on that basis. If it can, there is no prior restraint of the non-judicially-viewed material, except purely incidental . . . .

"The constitutional power of the State to abate what has been appropriately defined as a public "nuisance" has never been seriously questioned. "Padlock" remedies have been consistently provided for by most states in the areas of prostitution, gambling, and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the State's padlock power should be classed differently than obscenity. Each is a proper object of the police power and not unrelated . . . .

"Mugler v. Kansas, 123 U.S. 623 (1887) involved Kansas' first prohibition laws and, among others, a section providing, 'All places where intoxicating liquors are . . . . sold . . . . are declared to be common nuisances and upon the judgment of any court . . . . finding such place to be a nuisance under this section, the sheriff . . . . shall be directed to shut up and abate such place . . . .' The place involved had been the subject of liquor sales. The Court, in upholding the constitutionality, said:

> 'The State, having authority to prohibit the . . . . sale of intoxicating liquors. . . . we do not doubt her power to declare any place kept and maintained for the illegal manufacture and sale of such, shall be deemed a common nuisance and to be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes . . . The statute does not put the brand of a common nuisance upon any place, unless . . . . that place is kept and maintained for purposes declared by the legislature to be injurious to the community.' (Underscoring ours.)

"The padlocking provision of the Ohio statute is a time honored remedy involving the place - it is not censorship or prior restraint."

F. EIGHTH ALLEGED DEFECT.

Appellants' eighth claim notes that, while the option of the owner of the premises under

R. C. section 3767. 06 may ameliorate the harshness of the penalty of closure as to him, "it does nothing to save the tenant in possession or operator of the theater, neither of whom have any such correlative statutory right. . . ." While that is true, the theater operator is not without his own option under the terms of the statute.

R. C. section 3767. 04 provides an exhibitor with the simple defense of confession and avoidance. Under section 3767. 04 the trial judge is required to issue the temporary injunction "If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge." The trial judge, however, is not mandated to padlock the premises if the "person owning, in control, or in charge of the nuisance so enjoined . . . shows to the satisfaction of the court or judge that the nuisance complained of is abated." Where, for example, the public nuisance was found to exist solely on the basis of one film and such showing was not representative of the course of conduct normally experienced, then it may be unreasonable to hold that a public nuisance exists if, at the time of the trial judge's finding and the preliminary injunction, the film is not showing as the result of having been "pulled" by a responsible exhibitor. See Brief for Appellants in Huffman et al. v.

Pursue Ltd., No. 73-296 at pp. 84-89.

There is no reason for this Court to believe that a good faith execution of that option on the part of the theater operator will not be recognized by an Ohio Equity Court. That matter, however, is not before the Court on this appeal, inasmuch as the Appellant theater operator did not exercise its option and, instead, elected to continue maintaining the nuisance (showing the film) notwithstanding the adverse decision by the trial court.

Appellants' further claim in their Jurisdictional Statement at pages 10-11 that "neither does it alleviate the problem of compelling the owner to come forward and disprove affirmatively what the complainant was never required to prove under the statute to obtain the closing order in the first instance." is answered herein at page 20 wherein Appellee replies to a similar contention made under the Fourth Alleged Defect. The burden of proof is on the complainant.

G. NINTH ALLEGED DEFECT.

A fair reading of the Ohio Supreme Court opinion in Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 916 does not support Appellants' claim that the Supreme Court did not construe the nuisance statute to avoid overbreadth"

(which, it is claimed, would result if both private possession and public dissemination of obscene materials were included within the ambit of the statute). At the very least, the Ohio Supreme Court's statement reading: "Therefore, Stanley v. Georgia is not applicable to the exhibition of obscenity by a theater open to the public" recognizes that governmental sanctions against the private possession of obscenity is forbidden. Such statement is susceptible to one of two interpretations: either 1) that Stanley v. Georgia is not applicable because private possession is not within the ambit of the statute, or 2) that Stanley v. Georgia is not in point because the case on appeal (i.e. the statute as applied) deals with public exhibitions, and the "consenting adult" theory did not bring the matter within the exception as to private possession.

Further, in framing the above issue for the consideration of the Ohio Supreme Court below, Appellants did not raise the question properly. Whitney v. California, 274 U.S. 357, 71 L.Ed.1045, 47 S.Ct. 641. The issue was not stated as being one of "overbreadth". See Brief for Appellants in State of Ohio ex rel. Ewing v. "Without A Stitch", In the Supreme Court of Ohio, No. 71-649, at page 20. The question which was raised by Appellants in the Ohio

Supreme Court pertained to the "consenting adults" argument which, as noted by the Ohio Supreme Court opinion, was rejected in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446.

H. ELEVENTH ALLEGED DEFECT.

Appellants' claim that the statutory scheme "provides no procedural assurance of an immediate hearing after either temporary or permanent restraint, no assurance of an immediate judicial decision thereafter, and no assurance of a speedy and accelerated judicial review" is answered herein, in part, at page 17, wherein Appellee replied to a related argument made under the Third Alleged Defect.

By way of further reply, Appellee submits that the right of a state court system to impose a judicial restraint by way of preliminary injunction after a hearing on the merits, is no longer a debatable issue. The constitutional requirement for a "prompt final judicial decision" referred to by this Court in administrative prior restraint cases such as, Marcus v. Search Warrants, 367 U.S. 717, 6 L.Ed.2d 1127, 81 S.Ct. 1708 (June 19, 1961); A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (June 22, 1964); Freedman v. Maryland,

380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (Mar. 1, 1965); and Teitel Film Corp. v. Cusack, 390 U.S. 139, 19 L.Ed.2d 966, 88 S.Ct. 754 (Jan. 29, 1968), had reference to a speedy determination by a trial court as distinguished from a prior restraint applied in administrative proceedings.

If the language and reference of this Court in Teitel Film to "prompt final judicial decision by the trial court" was not clear (at page 969):

> ". . . the Chicago censorship procedures violate these standards in two respects. . . (2) the absence of any provision for a prompt judicial decision by the trial court violates the standard that . . . the procedure must also assure a prompt final judicial decision . . . ."(Our emphasis.)

that issue was laid to rest in Interstate Circuit Inc., v. Dallas, 390 U.S. 676, 20 L.Ed.2d 225, at 235, fn.22, 88 S.Ct. 1298 (1968).

The Interstate Circuit decision, supra, gives a crystal clear understanding of what this Court meant in Freedman by "prompt, final judicial decision." This Court has not made an issue out of the time period which is expended in carrying out the appellate review. That was one of the issues in the Interstate Circuit case. In Interstate Circuit v. Dallas (No. 56), 390 U.S. 676, one of the questions presented in the

jurisdictional statement was:

> "1. Whether Dallas City Ordinance 11284 is unconstitutional because it does not guarantee a prompt, final judicial decision to review actions of the Dallas Motion Picture Classification Board in classifying a motion picture as 'not suitable for young persons'?" (See Brief of Appellant, Interstate Circuit, Inc., at page 3.)

In Interstate Circuit's brief on this question, (See Brief for Appellant at pp. 3, 20, and 21), the following argument was presented at page 20:

> "Applying Freedman to the Texas judicial system, Interstate believes it is absolutely necessary that the Texas Supreme Court see the picture in dispute in order to provide for a prompt, final judicial determination that the action of the censor is correct. That court must face its judicial duty to uphold constitutional guarantees.
>
> "Since Ordinance 11284 could only secure the rights of Interstate and others by the City's promise of 'best effort,' it appears that this is not enough. Lacking the power to provide for a system of prompt judicial review, the City of Dallas could only give a system of review that required 247 days for a final decision.
>
> "This case is a perfect demonstration of the importance of the requirements of the Freedman case, as set out on page 59:
>
> 'Therefore, the procedure must also assure a prompt, final judicial decision to minimize the

> deterrent effect of an interim and possibly erroneous denial of a license.'
>
> "Neither Texas statutes nor decisions of its appellate courts assures a prompt, final judicial decision. Judge Hughes' opinion on the first ordinance is still correct. There is no provision in the Texas statutes for prompt, judicial review in the trial and appellate courts, and experience shows that the risk of delay is built into the Texas procedure. The Texas Judicial System does not assure procedural safeguards that satisfy the requirements of Freedman . . . ."

It was in the framework of such arguments that this Court gave its reply in Interstate Circuit, supra, at page 235, fn. 22:

> "22. Appellants also assert that the city ordinance violates the teachings of Freedman v. Maryland, supra, because it does not secure prompt state appellate review. The assurance of a 'prompt final judicial decision' (380 U.S. at 59, 13 L. Ed. 2d at 655) is made here, we think, by the guarantee of a speedy determination in the trial court (in this case nine days after the Board's classification). See Teitel Film Corp. v. Cusack, 390 U.S. 139, 19 L. Ed. 2d 966, 88 S. Ct. 754 . . . ." (Our emphasis.)

II.

The Film "Without A Stitch" Is Not Protected by the First and Fourteenth Amendments.

Appellants' claim, that the film "Without

APPENDIX B

Opinion of the California Supreme Court in People ex rel. Joseph P. Busch, as District Attorney etc., et al., v. Projection Room Theater et al., ___ Cal.3d ___, decided March 4, 1976, holding that the California general public nuisance statutes (Civ. Code, §§ 3479, 3480; Pen. Code, §§ 370-371) may be employed to regulate the exhibition of obscene material to "consenting adults"; but deferring to this Court on the federal questions of the padlock penalty and an injunction against future exhibitions.

(See page 13, herein). . . . . B-1 to B-60

SUPREME COURT
FILED
Mar. 4, 1976
G.E. Bishel, Clerk

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE ex rel. JOSEPH P. BUSCH, as District Attorney, etc., et al., Plaintiffs and Appellants, vs. PROJECTION ROOM THEATER et al., Defendants and Respondents. (And 4 other cases.)+	L.A. 30432 to L.A. 30436 (inclusive) (Super. Ct. No. C56568)

In these consolidated cases we consider whether or not a civil action brought by law enforcement officers to restrain the exhibition of obscene books and films states a cause of action for relief under the public nuisance laws of this state. Plaintiffs, who are law enforcement officers acting on behalf of both the City

*These cases were previously entitled Busch v. Projection Room Theater, etc.

+ People ex rel. Busch v. Stan's Books (L.A. No. 30433); People ex rel. Busch v. Book Bin (L.A. No. 30434); People ex rel. Busch v. Jason's Books (L.A. No. 30435); People ex rel. Busch v. Galaxy Book Store (L.A. No. 30436).

"SEE DISSENTING OPINION"

and the County of Los Angeles, seek injunctive and other relief against defendants who, according to the five separate complaints filed herein, operate book stores or motion picture theaters in Los Angeles which exhibit magazines or films that are obscene under the laws of this state. While the five complaints are directed at different defendants and vary somewhat in the specifics of their allegations, the causes of action alleged in each are sufficiently similar in the facts alleged and in the charging allegations to permit us to consider them together.

For convenience we examine the pleadings in the case involving Projection Room Theater finding that our conclusions in that action are dispositive of the issues raised in all of the actions. Plaintiffs assert that defendants' operations constitute public nuisances which are subject to regulation and abatement either pursuant to the general public nuisance statutes (Civ. Code, §§ 3479, 3480; Pen. Code, §§ 370, 371), or under the Red Light Abatement Law (Pen. Code, § 11225 et seq.). Defendants dispute the contention. We will conclude that although the Red Light Abatement Law was not intended to apply to the exhibition of obscene magazines or films, nevertheless the complaint herein does state a cause of action under the general public nuisance

statutes.

The complaint herein alleges the following facts: Defendants own or operate specified premises in Los Angeles County in which acts of "lewdness" are taking place, namely, the "past and continuing exhibition" of magazines and films "all of which are lewd and obscene under the laws of this State, and therefore did and do constitute a nuisance under the laws of this State. . . ." It is further alleged that the magazines and films so exhibited by defendants have, as their dominant theme, an "appeal to the prurient interest in sex," that they are "patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters," and that they are "utterly without social value. . . ."

According to the complaint, the maintenance of these premises constitutes a public nuisance which will continue unless restrained and enjoined. Plaintiffs attached to the complaint numerous exhibits consisting of police reports summarizing the obscene nature of the magazines and films exhibited by defendants. The complaint sought multiple relief including: (1) preliminary injunction restraining defendants from conducting and maintaining the premises for the purposes

described above; (2) abatement of the premises as a public nuisance under sections 11230-11231 of the Penal Code (Red Light Abatement Law); (3) permanent injunction against defendants and their agents, officers and employees from operating the premises as a public nuisance; (4) closure of the premises for one year; (5) removal and sale of the fixtures and movable property thereon used in conducting the nuisance; (6) use of the proceeds from the sale to pay fees and costs in connection with the closure; and (7) other appropriate relief.

Defendants filed general demurrers to each complaint, asserting that plaintiffs failed to state a cause of action either under the public nuisance statutes or the Red Light Abatement Law. The trial court, considering itself bound by the decision in Harmer v. Tonylyn Productions, Inc. (1972) 23 Cal.App.3d 941, sustained the demurrers without leave to amend and entered judgments of dismissal. Plaintiffs appeal.

The scope of our inquiry herein is considerably narrowed by application of the familiar rule, acknowledged by defendants, that "a general demurrer admits the truth of all material factual allegations in the complaint" (Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal.3d 493, 496), and we may accordingly assume that all materials in

question, both magazines and films, are obscene within the meaning of Penal Code section 311, as alleged.

1. Public Nuisance Statutes

We first consider whether or not the allegations of the complaint, summarized above, sufficiently describe the existence of a public nuisance and note preliminarily the substantial identity of definitions appearing in Penal Code sections 370 and 371, and Civil Code sections 3479 and 3480, taken in conjunction. Section 370 of the Penal Code defines a public nuisance as "(a)nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, . . ." (Italics added.) When analyzed, section 370 reveals the following: the proscribed act may be anything which alternatively is injurious to health or is indecent, or offensive to the senses; the results of the act must interfere with the comfortable enjoyment of life or property; and those affected by the act may be an entire neighborhood or a considerable number of persons, and as amplified by Penal Code section 371 the extent of the annoyance or damage on the affected

individuals may be unequal.

Is the exhibition of obscene magazines and films a form of activity which may be characterized as "indecent" or "offensive to the senses" interfering with the comfortable enjoyment of life of a "considerable number of persons" within the contemplation of Penal Code section 370? We conclude that such exhibitions may fairly be deemed such conduct, and we find convincing support for such conclusion from applicable cases in this and other jurisdictions.

In Weis v. Superior Court (1916) 30 Cal.App. 730, the Court of Appeal ruled that an attraction known as the "Sultan's Harem," conducted at the Panama-California International Exposition, constituted a public nuisance subject to abatement. This exhibition assertedly involved the "indecent and offensive" exposure to members of the public of the "naked persons and private parts thereof" of various female employees. Although such conduct also constituted the crime of indecent exposure (Pen. Code, § 311), nevertheless the Weis court held that "(w)here, however, the threatened acts, if committed, in addition to being an indictable offense, will constitute a public nuisance, courts of equity are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the

maintenance thereof. (Citations.)" (Weis at p. 732). Furthermore, the court, quoting from Wood on Nuisances (§ 68), stated that " 'A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene pictures, and any and all exhibitions, the natural tendency of which is to pander to vicious. . . and disorderly members of society.' " (Ibid., italics added.)

The foregoing Weis reasoning was approved by us more than 30 years ago in People v. Lim (1941) 18 Cal.2d 872, 879. Lim involved the propriety of an injunction against gambling activities on the ground that they constituted a public nuisance. We upheld in Lim the use of the public nuisance injunctive remedy against gambling activity which, it was alleged, disturbed the public peace and corrupted public morals. In Lim we carefully traced the history of public nuisance actions and noted that "The courts have . . . refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance." (P. 879.) Although, as we noted, such activities as gambling

or usury do not fit comfortably within the above quoted statutory definition of public nuisance, in Lim we acknowledged that an "indecent" exhibition such as was involved in Weis could be enjoined despite the concurrent application of the criminal statutes, since such exhibitions if determined to be indecent are expressly declared by section 370 to be public nuisances.

While carefully noting that Weis involved live dance performances, we discern no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and "live" performances on the other. The presentation of either may fairly be described as "indecent" and equally injurious to public morals.

Defendants have insisted that only those activities may constitute public nuisances which are offensive to the five senses of hearing, sight, touch, smell, and taste. It is claimed that public nuisance and abuse of the five senses coextensive. Defendants in so arguing focus only upon that category of nuisances described in Penal Code section 370 and Civil Codes section 3479 as conduct which is "offensive to the senses." The contention is erroneous for such reasoning completely ignores the additional language appearing in both sections which explicitly includes

as an alternative class of public nuisance conduct "anything which is indecent." When the question is put, which of the five senses is offended by conduct that is "indecent," it becomes readily apparent both that the thesis of the argument does not fit the legislative language and that conduct offensive to a community's moral sensibilities is likewise subject to regulation under section 370. Thus, the court in Weis, supra, at page 733, unequivocally states that ". . . any act which is an offense against public decency, or any public exhibition which is offensive to the senses, whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society, is a public nuisance." (Italics added.)

The trial court herein, in sustaining defendants' demurrers without leave to amend, considered itself controlled by the holding in Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App.3d 941 (hg. den.). Harmer is distinguishable, however, since it involved an action by private citizens to enjoin a particular film being shown at the premises in question. The Harmer court ruled that plaintiff had failed to allege the necessary special damages requisite to bringing a public nuisance action (see Civ. Code, § 3493) thus casting doubt upon his status as a litigant.

In contrast, the instant action is brought by public officials acting on behalf of the public generally and proceeding under provisions (see Code Civ. Proc., § 731) which expressly confer standing upon them.

More fundamentally, however, Harmer fails properly to analyze the nature of the state's interests in regulating the exhibition of obscene matter. Harmer suggests that since "only those members of the community were exposed to the film who voluntarily chose to see it," therefore "(t)he nuisance was not one which is inflicted or imposed on the public." (Harmer at p. 943.) Such reasoning frequently advanced and variously stated, misses the point. The fact that obscene or other indecent exhibitions take place behind closed doors and are viewed only by those who choose to view them does not defeat the community's interest in regulating such exhibitions.

Substantially identical arguments were advanced and rejected by us recently in People v. Luros (1971) 4 Cal.3d 84, and by the United States Supreme Court in Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49. In both Luros and Paris, the argument was made that the state had no legitimate interest in regulating the exhibition and distribution of obscene matter to consenting adults. Defendants in each case urged

that Stanley v. Georgia (1969) 394 U.S. 557, was controlling on this point. Stanley, however, held only that private possession of obscene matter cannot constitutionally be made a crime. In Luros, we carefully noted the important distinction, recognized by the federal Supreme Court in Stanley, between commercial distribution of obscenity and the private possession thereof. We concluded that ". . . in the context of public distribution of obscenity, the balance of interests upholds the constitutionality of state regulation, even though that regulation imposes some burdens upon the exercise of constitutional rights. . . . States retain broad power to regulate obscenity and regulation of the public distribution of obscenity falls well within the broad scope of that power." (4 Cal.3d at pp. 92-93.) We reaffirm the foregoing conclusion reached by us in Luros.

Similarly, Paris (decided after Harmer was filed) rejected the extension of Stanley to situations involving consenting adults. The high court specifically addressed the Harmer limitation on the scope of the public interest, and "categorically disapprove(d) the theory, . . . that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults

only." (413 U.S. at p. 57; see also pp. 57-69.) The court noted that "(t)he States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. (Citations.)" (Id. at p. 57.) These "legitimate interests" include "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime." (Fn. omitted; id. at p. 58, italics added.) Further, "(a)lthough there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist." (Id. at pp. 60-61.)

Following its rejection of the argument that Stanley forbids state regulation of the exhibition or distribution of obscene matter, the Paris court very significantly observed: "Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open

to the adult public falls within a State's broad power to regulate commerce and protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' 'right . . . to maintain a decent society.' (Citation.)" (Italics added; Paris at pp. 68-69.) Both Luros and Paris explain and confirm that the interests of those who voluntarily view and purchase obscene materials are not necessarily coextensive with the interests of the community at large.

Even more recently the United States Supreme Court has noted that a state's public nuisance action seeking to close a theater exhibiting obscene films constituted an effort "to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." (Fn. omitted; Huffman v. Pursue, Ltd. (1975) 420 U.S. 592, 605.)

Thus, the Paris court has clearly held that

states may constitutionally determine that public exhibition of obscene material has a tendency to injure the community or to jeopardize the maintenance of a decent society. In Luros we confirmed the validity of state regulation of the commercial distribution of obscene materials. The legislative definition of a public nuisance includes "(a)nything which is . . . indecent, or offensive to the senses, . . . so as to interfere with the comfortable enjoyment of life or property by a . . . community or neighborhood, or . . . any considerable number of persons. . . ." (Pen. Code, § 370.) California's public nuisance definition, including as it does indecency, comports fully with the state's power to regulate as recently declared both by the federal Supreme Court and by ourselves and fortifies our conclusion that public nuisance laws may properly be employed to regulate the exhibition of obscene material to "consenting adults."

Given the legitimate state interests in controlling the exhibition of obscenity, carefully outlined in Paris, it is not surprising that a wide variety of cases, both before and after Paris, have confirmed that such exhibitions constitute nuisances which properly may be abated by the courts. (Grove Press, Inc. v. Flask (D. Ohio 1970) 326 F.Supp. 574, vacated and remanded on

other grounds, 413 U.S. 902; Bloss v. Paris Township (Mich. 1968) 157 N.W.2d 260, 261; Cactus Corporation v. State ex rel. Murphy (Ariz. Ct. App. 1971) 480 P.2d 375; Evans Theater Corporation v. Slaton (Ga. 1971) 180 S.E.2d 712, cert. den. 409 U.S. 950; New Rivieria Arts Theatre v. State (Tenn. 1967) 412 S.W.2d 890, 893-895; Sanders v. State (Ga. 1974) 203 S.E.2d 153, 156-157; State ex rel. Ewing v. "Without A Stitch" (Ohio 1974) 307 N.E.2d 911, app. dism. ___ U.S. ___ (43 U.S.L. Week 3569); State ex rel. Keating v. Vixen (Ohio 1971) 272 N.E.2d 137, vacated and remanded on other grounds, 413 U.S. 905, opn. on remand, 301 N.E.2d 880; State ex rel. Little Beaver Theatre, Inc. v. Tobin (Ct. App. Fla. 1972) 258 So.2d 30, 31-32; State v. Morley (N.M. 1957) 317 P.2d 317, 318-319.)

Each of the above cases either expressly or implicitly recognizes that the exhibition of obscene magazines or films constitutes a public nuisance properly subject to abatement. For example, the Georgia Supreme Court in Evans upheld application of a general public nuisance statute to an allegedly obscene film "I Am Curious (Yellow)." The court explained that '(i)f any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in

the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public. . . . The exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film." (180 S.E.2d at pp. 715-716.)

Evans was cited and discussed with approval in Paris, supra, 413 U.S. 49, 54-55, wherein the court expressly approved use of public nuisance actions to enjoin the exhibition of obscene materials. Since this portion of Paris is critical to our analysis, we quote it in its entirety:

"Georgia case law permits a civil injunction of the exhibition of obscene materials. (Citations, including Evans, supra.) While this procedure is civil in nature, and does not directly involve the state criminal statute proscribing exhibition of obscene material, the Georgia case law permitting civil injunction does adopt the definition of 'obscene materials' used by the criminal statute. Today, in Miller v. California, supra, we have sought to clarify the constitutional definition of obscene material subject

to regulation by the States, and we vacate and remand this case for reconsideration in light of Miller.

"This is not to be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation. (Citation.) Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected. Thus the standards of (prior United States Supreme Court decisions) were met." (Italics added; Paris at pp. 54-55.)

Similarly, as we explain hereinafter, the California public nuisance statutes must be enforced in such a way as to operate in a constitutional fashion. So applied, as the foregoing cases make clear, there is no overriding principle of law which precludes the states from regulating the exhibition of obscene matter by application

of their public nuisance statutes. To this extent, Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App. 3d 941, is disapproved.

We do not suggest, of course, that law enforcement officers in each city and county in this state have a mandatory duty always and everywhere to abate the exhibition of obscene matter within their borders. The particular nature of the exhibition, and its effect upon the community, may vary considerably in time and place. Law enforcement officers accordingly are vested with wide discretion to decide whether or not to initiate the kind of formal abatement proceedings such as those instituted in the matters before us. (See Code Civ. Proc., § 731.) Once a community through its public officials has determined that a particular display of obscene materials amounts to a public nuisance which is injurious to the safety and morals of that community, no valid reason exists why, adequate constitutional procedural safeguards being met, the remedy of civil abatement proceedings must be denied such community. The availability of the public nuisance procedure may prove useful for those local entities which, determining that they are confronted with commercial exploitation of obscene materials resulting in the conditions contemplated in section 370, elect to use it.

We consider and will reject several constitutional objections raised by defendants.

Defendants first suggest that the statutory language "indecent, or offensive to the senses" (Pen. Code § 370) is impermissibly vague, requiring them to guess as to its meaning, and thus is violative of the First Amendment to the federal Constitution. Several cases involving similar language have avoided the constitutional problem by construing such language as synonymous with the word "obscene," as defined in the applicable statutes and case law. (See In re Giannini (1968) 69 Cal.2d 563, 571, fn. 4 ("lewd or dissolute conduct"); Silva v. Municipal Court (1974) 40 Cal.App.3d 733, 736-737 (same); Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578 ("lewd, indecent, lascivious or obscene"); Janus Films, Inc. v. City of Fort Worth (Tex. Ct. App. 1962) 354 S.W.2d 597, 600 ("indecent"); State ex rel. Ewing v. "Without A Stitch," supra, 307 N.E.2d 911, 914-915 ("obscene" construed in light of recent United States Supreme Court opinions); State ex rel. Cahalan v. Diversified Theat. (Mich. Ct. App. 1975) 229 N.W.2d 389, 393-394 ("lewdness").)

Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitu-

tional doubts. "If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material (in federal statutes), we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California . . . ." (Italics added; United States v. 12 200-Ft. Reels of Film (1973) 413 U.S. 123, 130, fn. 7; accord, Hamling v. United States (1974) 418 U.S. 87, 114.) Indeed, in Bloom v. Municipal Court (1975) ____ Cal. 3d ____, ____, we have construed our own obscenity statute (Pen. Code, § 311, subd. (a) ("obscene matter")) as referring to the patently offensive matter set forth in Miller, supra, and have rejected the contention that the statute is unconstitutionally vague. (Accord, People v. Enskat (1973) 33 Cal.App. 3d 900.) We find no impediment to use of the remedy on grounds of statutory vagueness.

Defendants next assert that use of the public nuisance statutes to enjoin or otherwise abate the exhibition of films or magazines violates the constitutional principle against prior restraint of presumptively protected materials.

(See Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 558; United States v. Thirty-seven Photographs (1971) 402 U.S. 363, 367; Freedman v. Maryland (1964) 380 U.S. 51, 58; Kinglsey Books, Inc. v. Brown (1957) 354 U.S. 436.) We note preliminarily that, as the foregoing cases make clear, prior restraints are not unconstitutional per se; a prior restraint may avoid constitutional infirmity if it occurs "under procedural safeguards designed to obviate the dangers of a censorship system." (Southeastern Promotions, Ltd., supra, at p. 559.) Among other safeguards, "a prompt final judicial determination must be assured." (Id. at p. 560.)

In order properly to evaluate defendants' prior restraint contention, we first review the possible forms of relief available to plaintiffs in an ordinary public nuisance action. The public nuisance statutes, unlike the Red Light Abatement Law, do not provide for such specific forms of relief as temporary and perpetual injunction (Pen. Code, §§ 11226-11227), removal and sale of fixtures, and closure of the premises for one year (Pen. Code, § 11230). Instead, the district attorney or city attorney is, in general terms, empowered to bring a civil action to "abate" the public nuisance. (Code Civ. Proc., § 731). Further, " 'An abatement of a nuisance is

accomplished in a court of equity by means of an injunction proper and suitable to the facts of each case. . . . ' " (Italics added; Guttinger v. Calaveras Cement Co. (1951) 105 Cal.App.2d 382, 390; see generally McQuillin, Municipal Corporations, § 24.73.)

Thus, in the matters before us if the trial court finds the subject matter obscene under prevailing law an injunctive order may be fashioned that is "proper and suitable" in each case. It is entirely permissible from a constitutional standpoint to enjoin further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing. (Paris Adult Theatre I v. Slaton, supra, 413 U.S. 49, 54-55 (approving Georgia abatement procedure); Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 579; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; State ex rel. Ewing v. "Without A Stitch", supra, 307 N.E.2d 911, 914; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Keating v. Vixen, supra, 272 N.E.2d 137; see Commonwealth v. Guild Theatre, Inc. (Pa. 1968) 248 A.2d 45; Grove Press Inc. v. City of Philadelphia (3d Cir. 1969) 418 F.2d 82, 90-91; Sanders v. State, supra, 203 S.E.2d 153, 156-157.) The relevant principle derived from the foregoing

cases is that, except in extremely limited situations (see United States v. Thirty-seven Photographs, supra, 402 U.S. 363), no injunctive relief, whether temporary or permanent in nature, may be afforded until defendant has been given a a full and fair judicial hearing on the issue of obscenity, and an opportunity to obtain prompt judicial review of that issue by the state appellate courts.

We express no opinion upon the further question whether the court may, in addition, either close the premises entirely or enjoin further "obscene" exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible. (See People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App.3d 556, 562-563; Bloss v. Paris Township, supra, 157 N.W. 2d 260; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578-580; Oregon Bookmark Corporation v. Schrunk (D. Ore.1970) 321 F.Supp. 639; State ex rel. Cahalan v. Diversified Theat., supra, 299 N.W.2d 389, 396-397; United Theatres of Florida, Inc. v. State ex rel. Gerstein (Fla. Ct. App. 1972) 259 So.2d 210, 212-213, vacated and remanded, 419 U.S. 1028.) Other cases have held that such relief would constitute an invalid prior restraint of

presumptively protected materials (Gulf States Theatres of Louisiana, Inc. v. Richardson (La. 1973) 287 So.2d 480, 489; Mitchem v. State ex rel. Schaub (Fla. 1971) 250 So.2d 883, 886-887; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; Sanders v. State, supra, 203 S.E.2d 153, 156-157; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Ewing v. "Without A Stitch", supra, 307 N.E.2d 911, 917-918.) Since the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration.

Defendants finally maintain that since the public nuisance statutes are silent with respect to prior adversary hearings, this court should not undertake to "rewrite" those statutes to require such hearings. Such a contention lacks merit. We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145; In re Kay (1970) 1 Cal.3d 930, 941-942.) Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions. (State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 31-32; see United States v.

Thirty-seven Photographs, supra , 402 U.S. 363, 367-373.) As hereinabove expressed, abatement of a nuisance is accomplished by means of a "proper and suitable" injunction. In the context of assertedly obscene magazines and films, a "proper" injunction ordinarily is one that is issued after the requisite adversary hearing has taken place.

We emphasize that the proceedings now before us remain at the pleading stage. Having determined that plaintiffs' complaint is sufficient to state a cause of action based upon a general nuisance theory, we consider it inappropriate to describe in detail the precise dimensions of the injunctive and other relief which might be suitable in this and the related cases. It is enough that the parties and the trial court recognize that substantial constitutional issues are presented in this litigation, and that care must be exercised to assure that defendants' constitutional rights are not infringed. More than this is not required.

2. Red Light Abatement Law

As an alternative theory of relief, plaintiffs allege that defendants' exhibition of obscene magazines and films constitutes a nuisance subject to abatement under the provisions of the Red Light Abatement Law (Pen. Code, § 11225 et seq.). We have previously noted that these provisions pre-

scribe certain specific forms of relief not available under the general nuisance statutes, including temporary injunctions, removal and sale of fixtures, and closure of the premises for one year. (Pen. Code, §§ 11227, 11230.)

The Red Light Abatement law defines as a nuisance "(e)very building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution. . . ." (Italics added.) Defendants maintain that the term "lewdness" does not include the exhibition of obscene magazines or films in bookstores or theaters. We agree.

The law was passed in 1913 and, as its name indicates, its primary purpose was to regulate ". . . houses of ill fame, . . . and other like places, where acts of lewdness and prostitution are habitually practiced and carried on as a business." (People v. Barbiere (1917) 33 Cal. App. 770, 775.) It has been held that the terms "lewdness, assignation, or prostitution" were "obviously" intended to refer to "illicit sexual acts or conduct amounting to or involving lewdness." (People v. Arcega (1920) 49 Cal.App. 239, 242.) The term "lewdness" is not synonymous with "prostitution" and has a broader significance, including "all other immoral or degenerate conduct or conversation between persons of opposite sexes,

. . ." including the solicitation of sexual acts to be performed elsewhere. (People v. Bayside Land Co. (1920) 48 Cal.App. 257, 260.)

The consensus of more recent cases is that the term "lewdness" is broad enough to include live lewd entertainment, such as stage shows or other exhibitions featuring obscene performances. (People ex rel. Hicks v. Sarong Gals (1972) 27 Cal.App.3d 46, 50, subsequent opn., supra, 42 Cal.App.3d 556, 559; Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App.3d 941, 944; Maita v. Whitmore (N.D.Cal. 1973) 365 F.Supp. 1331.) Yet no California case has yet held that the Red Light Abatement Law was intended to apply to the exhibition of obscene magazines or films. As stated in Harmer: "If the Legislature had desired or intended by section 11225 of the Penal Code to regulate the showing of pornographic films, pictures or drawings, such subject matter could have been included in section 11225 when it was recently amended in 1969, as it did when it chose to enumerate 'illegal gambling as defined by state law or local ordinance' in that section of the Penal Code." (23 Cal.App.3d at p. 944.) On the other hand, it has been forcefully contended that "it borders upon the absurd to apply the law to live stage shows and exhibitions that are lewd and to deny its application to motion

pictures that are patently lewd and obscene." (Id., at p. 952 (dis.opn.); see also People ex rel. Hicks v. Sarong Gals, supra, 27 Cal.App.3d at p. 50.)

The courts of other states have generally agreed that "red light" laws do not apply to the exhibition of obscene books or films. (People v. Goldman (Ill. App. Ct. 1972) 287 N.E.2d 177; Gulf States Theaters of Louisiana, Inc. v. Richardson, supra, 287 So.2d 480; Southland Theatres, Inc. v. State (Ark. 1973) 492 S.W.2d 421; State v. Morley, supra, 317 P.2d 317, 318-320.) On the other hand, the most recent case on the point holds that the term "lewdness" in Michigan's "red light" act is broad enough to include the exhibition of films which are obscene under the standards set forth in Miller v. California, supra, 413 U.S. 15, 25. (State ex rel. Cahalan v. Diversified Theat., supra, 299 N.W.2d 389, 393.)

Although the question is not free from doubt, in view of the history of the Red Light Abatement Law and the uniform interpretation given it by the courts of this state, we conclude that the act's provisions were not intended to apply, and do not apply, to the exhibition of obscene magazines or films.

The judgment is reversed and the cause

remanded for further proceedings consistent with this opinion.

RICHARDSON, J.

WE CONCUR:

McCOMB, J.
SULLIVAN, J.
CLARK, J.

C O P Y

BUSCH V. PROJECTION ROOM THEATRE

L.A. 30432 to L.A. 30436 (Inclusive)

DISSENTING OPINION BY TOBRINER, J.

The majority today empowers city attorneys to bring actions to abate the sale or display of purportedly obscene material as a public nuisance, even when such sale or display occurs wholly within the confines of an adult bookstore or theatre and thus in no way afflicts those members of the community who would find it offensive. By permitting a city attorney who objects to certain material to wield this drastic remedy --a remedy designed for those rare cases where any delay would concretely imperil the public interest -- the majority endangers freedom of expression to an extent never before contemplated in this state. The owner of every bookstore, market, drugstore, airport, or other business place which sells "Playboy," "Playgirl," or similar publications must henceforth labor beneath the Damocles sword of public nuisance: if a city attorney decides that a single picture in one of those magazines is obscene, and so convinces a single judge, the owner may be compelled to

close his place of business or to discontinue the sale of materials that have never been judged obscene.

This court could not, without abdicating its responsibility to secure the rights provided by the federal and state Constitutions, sanction a legislative decision to endow a city attorney with so onerous and clumsy a weapon in his attempt to purge the private viewing of exhibitions he deemed "indecent." The vagueness of the prescribed conduct and the prior restraint on First Amendment activity would render such a law doubly vunerable to constitutional challenge.

As we shall point out, however, this case may be resolved on grounds other than that the Legislature exceeded constitutional bounds when it enacted the public nuisance laws; those laws simply do not confer upon the city attorney the power that the majority today bestows upon him. As drafted by the Legislature, the public nuisance laws provide an extraordinary remedy for situations that truly demand one; it is only as rewritten by the majority that these laws trench upon constitutional rights.

Courts of equity enjoy no roving commission to define public nuisances; they may abate only such nuisances as the Legislature declares. In People v. Lim (1941) 18 Cal.2d 872, 881, we

acknowledged that "the responsibility for establishing those standards of public morality, the violations of which are to constitute public nuisances within equity's jurisdiction, should be left with the legislature."[1/] Our charge,

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1/ The judicial reluctance to proclaim new species of public nuisance is well founded. The remedy of abatement, fashioned as it was to equip the courts to deal expeditiously with serious perils to the public, denies the defendant many of the procedural safeguards he would enjoy if he were subjected to an ordinary civil or criminal action. "(I)t is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons equity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted." (People v. Lim, ante, 18 Cal.2d 872, 880 (citations omitted.))

That the majority opinion denudes the defendants of their rights to have a jury determine whether the exhibitions are actually obscene proves particularly distressing. In Bloom v. Municipal Court (1976) ___ Cal.3d ___, a majority of this court incorporated into the definition

(footnote continued on next page)

consequently, is a limited one: we must ascertain whether the Legislature has declared that the conduct complained of in the present case constitutes a public nuisance.

It has not. The public nuisance statutes do not embrace conduct whose tangible effects are limited to a small group of consenting adults. A careful reading of the statutes discloses that they govern only public nuisances -- that is, only those nuisances that bear concretely upon the health or senses of a substantial number of people. The statutory language supports this conclusion in two ways.

First, only such indecent behavior as assaults the senses of the community constitutes a public nuisance. The majority bases its contrary conclusion on section 370 of the Penal Code which defines a public nuisance to be anything "which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property. . . ." The majority argues

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of obscenity in section 311 of the Penal Code the guidelines set forth in Miller v. California (1972) 413 U.S. 15. Central to the Miller test is whether "the average person, applying contemporary community standards" would find that the work appeals to the prurient interest. The jury, as a microcosm of the community, is the only vehicle fit to conduct that inquiry.

that this language recognizes four classes of conduct that may constitute a public nuisance: conduct that is (a) injurious to health; (b) indecent; (c) offensive to the senses; or (d) an obstruction to property. Since indecency is a ground for finding a public nuisance quite apart from offense to the senses, the argument goes, the statute subsumes even private indecency which has no impact upon the senses of the community as a whole.

The majority's error is fundamental: it construes the wrong statute. Although sections 370-372 of the Penal Code govern the criminal dimension of public nuisances, section 731 of the Code of Civil Procedure governs their abatement. That section provides that "(a) civil action may be brought . . . to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code. . . ." (Emphasis added.) Although the majority alludes to the "substantial identity" of the Penal Code and Civil Code definitions, I find them different in one pivotal respect.

Since section 3480 of the Civil Code merely provides that "a public nuisance is one which affects at the same time . . . any considerable number of persons," we must refer to the definition of nuisance set forth in the preceding

section. Section 3479 of the Civil Code defines a nuisance to be anything "which is injurious to health, or is indecent or offensive to the senses, or an obstruction of the free use of property. . . ." (Emphasis added.) The difference between this definition and that contained in the Penal Code is subtle, but crucial. The phrase "to the senses" in section 370 of the Penal Code modifies only the word "offensive"; here, it modifies both indecent and offensive. According to the Civil Code, therefore, indecent conduct is a public nuisance only when it is "indecent . . . to the senses" of a substantial number of people. Consequently, a court may not abate a public nuisance unless it assaults the senses, not merely the sensibilities or tastes, of the community.[2/]

2/ This argument, admittedly, lets a great deal turn on the absence of a comma in Civil Code section 3479, but the majority lets an equal amount turn on the presence of a comma in section 370 of the Penal Code. Since the statute authorizing the abatement of nuisances explicitly refers to the Civil Code definitions, there can be no doubt that we are to construe the section that lacks the comma. It is quite likely, of course, that this difference in punctuation between the two sections is accidental, and that their drafters intended their scope to be coextensive. This court, consequently, might reasonably decide to interpret the sections identically, notwithstanding their different punctuation.

That the private sale or display of obscene material may not be abated as a public nuisance is thus manifest. Such materials do not impact "at the same time" on the senses of a "considerable number of people." (Civ. Code, § 3480.) The result would be different if the purportedly obscene materials were flaunted on a public billboard. In that event, the indecent behavior or object would simultaneously affect the senses of a large group. But where the purportedly indecent behavior occurs in private, the mere

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Which section, however, contains the error and which section is correct? It is difficult to ascertain the intent that motivated the Legislature when it enacted these statutes in 1872 and amended them in 1874; any conclusion that one rather than the other involved the error in punctuation, therefore, is fraught with uncertainty. Nonetheless, if we must choose which section is correct, we should honor the definition embodied in the Civil Code. The fact that section 731 of the Code of Civil Procedure refers to the Civil Code definitions gives some indication that those definitions comport with the Legislature's wishes. Moreover, the preferences for narrowly construing statutes that infringe first amendment values and for interpreting statutes in light of the consequences of the alternative constructions, see infra, conjoin to urge that we embrace the Civil Code definitions. These considerations, I grant, do not conclusively establish that the Civil Code definition accurately reflects the legislative intent; there are no reasons, however, to prefer the definition contained in the Penal Code.

fact that even a large portion of the public disapproves of it fails to bring it within the purview of the public nuisance abatement statute.3/

The public nuisance statutes do not comprehend the private sale or display of obscenity for yet a second reason. The requirement that a public nuisance "interfere with the comfortable enjoyment of life or property" (Civ. Code, § 3479; Pen. Code, § 370) effectively excludes private behavior from the purview of the public nuisance statutes. In the present case, for example, the purportedly obscene exhibitions themselves in no way interfere with the comfortable enjoyment of life of those who do not enter the adult book stores or theatres; the materials do not obtrude upon those who never see them. Consequently, the necessity that the nuisance interfere with the comfortable enjoyment of life infuses both

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3/ The majority insists that conduct that is indecent does not offend any of the five senses, and thus that the use of the word "indecent" in the statute establishes that the public nuisance laws encompass conduct that does not bear upon the senses. (Ante, at p. ___*.) The answer is simple: even though conduct that is indecent does its damage to the sensibilities or tastes, rather than the senses, of the public, it falls within the public nuisance statute only when perceived by the senses of a substantial number of people.

*Majority opinion at page 9.

the Penal and Civil Codes with the requirement of public behavior that the phrase "indecent . . . to the senses" independently imports to the latter.

It might be argued that although the obscene materials themselves do not affect the lives of those who do not view them, the knowledge that there are stores or theatres that sell or display such materials does interfere with the comfortable enjoyment of life of a considerable number of people. So attenuated a discomfort, however, is far too meager to command the protection of the public nuisance statutes. There is no hint in the statutes or the cases construing them that conduct can constitute a public nuisance simply because some people stand philosophically opposed to it; the courts have demanded that conduct impinge more concretely upon a substantial number of people before branding it a public nuisance.

In People v. Robin (1943) 56 Cal.App.2d 885, 889, the court held that "the unlawful sale of liquor, of itself, . . . does not constitute a nuisance within the terms of section 3479, Civil Code. . . ." Since violating the laws regulating the sale of liquor is presumably as indecent as violating the laws regulating the sale of obscene material, the court

implicitly ruled that the mere fact that certain behavior runs afoul of society's preferences -- even as articulated in its criminal laws -- constitutes an inadequate basis for holding it a public nuisance.

In People v. Seccombe (1930) 103 Cal.App. 306, the court declined to abate the practice of usury as a public nuisance. It observed: "It is very evident that if following the despicable calling of userer constitutes a public nuisance (as defined in Civil Code section 3479) it must be because such conduct constitutes 'an obstruction to the free use of property.' . . . It could not by any stretch of the imagination be considered as covered by any other clause of the code definition." (103 Cal.App. at p. 310.) (Emphasis added.) The court's language left scant doubt that it thought that engaging in "the despicable calling of userer" smacked of indecency. Nonetheless, it expressly ruled that the practice could not qualify as a nuisance on the grounds that it was indecent or offensive to the senses of a large number of people.

In Dean v. Powell Undertaking Co. (1921) 55 Cal.App. 545, the court refused to abate the operation of a funeral parlor in a residential neighborhood as a public nuisance. The plaintiffs had complained that the operation of such an

establishment precluded the comfortable enjoyment of life for many residents who were squeamish about the proximity of dead bodies. The court explained that the plaintiffs deserved relief only if they could establish that the funeral parlor omitted noxious odors or otherwise afflicted the senses of the aggrieved parties, and that merely offending the sensibilities of some people would not render it a public nuisance. The Dean court quoted with approval the language of the New Jersey Court of Chancery in Wescott v. Middleton (1887) 43 N.J. Eq. 478, 486: "In this case, then, we have the broad, yet perfectly perceptible or tangible ground or principle announced that the injury must be physical as distinguished from one purely imaginative; it must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or refined fancy. . . ."

The Court of Appeal most recently addressed this issue in Harmer v. Tonylyn Productions Inc. (1972) 23 Cal.App.3d 941, in which private citizens brought an action pursuant to section 3493 of the Civil Code to enjoin the showing of a purportedly obscene film as a public nuisance. As the majority notes, Harmer ruled that the plaintiffs had not alleged the special damages

that section 3493 requires of private citizens who would bring an action to abate a public nuisance. In so holding, however, the court explicitly rejected the contention that the statutory language embraced such a private exhibition.

The Harmer court observed: "The film involved was shown only in a closed theatre. . . . Thus, only those members of the community were exposed to the film who voluntarily chose to see it. This is not a case where the community as a whole is forced to submit involuntarily to vile odors or air pollution or to the unwelcome presence of animals. In the statute's terms, the alleged nuisance at bench did not '. . . affect(s) at the same time an entire community or neighborhood. . . .' (Civ. Code, § 3480) (italics added)." (Citations omitted.) The court thus squarely rejected the notion that the mere existence of an establishment that deals in obscene materials constitutes a public nuisance, for if private indecent behavior fell within the public nuisance statute, the entire community would have been affected in Harmer.

The majority contends that Harmer improperly analyzed the character of the state interest in regulating the exhibition of obscene matter; it observes that Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49 and People v. Luros (1971)

4 Cal.3d 84, both recognize a legitimate state interest in regulating the distribution of obscene material to consenting adults. But those decisions merely testify to the outer limits of constitutional state regulation; they do not testify to the actual ambit of California's public nuisance laws. Harmer correctly construed the California statutes. The majority cannot rebut that construction by merely noting that, under prevailing constitutional doctrine, the Legislature stands empowered to draft more expansive statutes.

In support of its conclusion that the public nuisance statutes comprehend private indecent behavior, the majority relies primarily upon Weis v. Superior Court (1916) 30 Cal.App. 730, which involved the indecent exposure of women in an exhibit at the 1915 Panama-California International Exposition. In a three-and-one-half-page opinion the court ruled that it could abate the exhibition as a public nuisance in order to subserve the public morals and protect "men, women, and children attending this resort as spectators from being subjected to witnessing the offensive and indecent exhibition." (30 Cal.App. 733.)

Weis constitutes meager support for the expansion of the public nuisance statutes that

the majority today effects. It is not at all clear that spectators were adequately forewarned of the character of the exhibition involved in Weis. Although the exhibition's name might have given some hint of its nature, spectators could reasonably have assumed that the "Sultan's Harem" involved something less than actual nudity. Nor is there any indication that the manager of the exhibit attempted to convey its content to possible spectators by making it an "adults only" attraction; the court explicitly referred to the need to protect children from the exhibition. To the extent that Weis involved subjecting an unadmonished audience to indecent material, it has no bearing on the present case in which the allegedly indecent material was display exclusively within the confines of an "adults only" establishment.

The majority also attempts to cull support from People v. Lim, supra, 18 Cal.2d 872, which, it maintains, "approves the reasoning" of Weis. (Ante, at p. __*.) As noted above, however, it is not at all clear that the reasoning or the holding of Weis extends to truly private conduct. Lim itself did not involve indecency or obscenity, but a gambling establishment which, the complaint alleged, "draws together great

*Majority opinion at page 7.

numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property." We held simply that "crowds of disorderly people who disturb the peace and obstruct the traffic may well impair the free enjoyment of life and property and give rise to the hazards designated in the statute." (18 Cal.2d at p. 882.) Needless to say, the concrete interference with the public peace in Lim is quite distinct from the private behavior involved in the present case.

A careful study of the statutes and the cases thus impels the conclusion that the public nuisance statutes do not govern indecent conduct when such conduct is not thrust upon those who find it repugnant. The potent remedy of abatement is reserved for objects and behavior that concretely interfere with the enjoyment of life of a considerable number of people; to the extent that private indecent behavior offends the sensibilities of members of the community, they must rely on their public officials to enforce any apposite criminal laws.

Recent expressions of legislative and

popular will reinforce my conclusion that the public nuisance statutes do not govern private conduct. As explained above, Harmer v. Tonylyn Productions, Inc., ante, 23 Cal.App. 3d 941, ruled that California's public nuisance statutes did not embrace the sale or display of obscene material under circumstances in which such materials are exposed only to willing viewers. Following Harmer, several attempts were made legislatively to overrule the decision; the voters and legislators of this state rebuffed each attempt to establish public nuisance abatement procedures directed at obscenity.

In the 1972 general election, the electorate rejected by a vote of about two to one an initiative measure that would have endowed the district attorney of any county with the authority to maintain an action for an injunction in superior court to prevent the display or sale of obscene material.[4/] In June 1974, the

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4/ The relevant portions of the initiative (Proposition 19) read:

"CHAPTER 7.9. INJUNCTIVE RELIEF

"313.50. The superior courts of the State of California have jurisdiction to enjoin the sale or distribution of any book, magazine, or any other publication or article, or the public showing of any motion picture film, slide, exhibit, or performance which is prohibited under Chapters 7.5, 7.6, 7.7 or 7.8 of this title.

"313.51. The district attorney of any

Assembly Committee on Criminal Justice defeated

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county in this state in which a person, firm, or corporation sells or distributes, or is about to sell or distribute, or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing, photograph, or other publication or matter which is prohibited by the above enumerated chapters may maintain an action for an injunction against such person, firm, or corporation in the superior court to prevent the sale or further sale or the distribution or further distribution of any such prohibited publication or articles.

"313.52. The district attorney of any county in this state in which a person, firm, or corporation shows publicly, or is about to show publicly, or is about to acquire possession with intent to show publicly any motion picture film, slide, exhibit, or performance which is prohibited under the above enumerated charters may maintain an action for an injunction against such person, firm, or corporation in the superior court to prevent the public showing or further public showing of such prohibited matter or activity.

"313.53. The person, firm, or corporation sought to be enjoined is entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days after the conclusion of the trial.

"313.54. In the event that an order or judgment be entered in favor of the district attorney and against the person, firm, or corporation sought to be enjoined, such final order or judgment shall contain a provision directing the person, firm, or corporation to

(footnote continued on next page)

similar provisions in Assembly Bill No. 4340.[5/]

surrender to such peace officer as the court may direct or to the sheriff of the county in which the action was brought any of the matter described in Section 313.51 or 313.52, and such sheriff or officer shall be directed to seize and destroy the same, provided that destruction of such matter shall be stayed until after the time provided for filing a notice of appeal has expired, and provided further that where an appeal is timely filed, such destruction shall be stayed pending the decision on appeal."

Proposition 19 was defeated by a vote of 5,503,888 (67.9 percent) No to 2,603,927 (32.1 percent) Yes. Secretary of State, Statement of Vote, General Election November 7, 1972, page 30.

5/ The relevant portions read: "311.3(a) The superior court has jurisdiction to enjoin the sale, distribution or exhibition of obscene books, articles or films, as hereinafter specified:

"(1) The district attorney, county counsel, city attorney or city prosecutor of any county, city or town, in which a person, firm or corporation sells, distributes or exhibits or is about to sell, distribute or exhibit or has in his possession with intent to sell, distribute or exhibit any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, film figure, image or any written or printed matter of an indecent character which is obscene as defined in Section 311, may maintain an action for an injunction against such person, firm or corporation in the superior court to prevent the sale or further sale or the distribution or further distribution or the exhibition or further exhibition of such matter.

"(2) The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within 14 days after joinder of issue and a decision shall be rendered by the court

In light of the Harmer decision, and the subsequent rejection of proposed legislation which would have specifically authorized a nuisance abatement procedure to be used against obscenity, traditional canons of statutory construction teach that the existing nuisance provisions should not be judicially extended to encompass the display of allegedly obscene material to willing viewers. " 'Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it. (Citations.)' (People v. Hallner, 43 Cal.2d 715, 719; People v. Courtney, 176 Cal.App.2d 731, 741.) This rule is not rendered inapplicable by the fact that the determinative decision is rendered by a Court of

within two days of the conclusion of the trial.

"(b) In the event that a final order or judgment of injunction be entered in favor of such officer of the county, city or town and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff or any other law enforcement agency of the county in which the action was brought any of the matter described in paragraph (1) hereof and such sheriff or law enforcement agency shall be directed to seize and destroy the same or to hold the same as evidence."

Appeal." (People v. Orser (1973) 31 Cal. App.3d 528, 533-534, fn. 4.)

Properly construed, the public nuisance statutes do not embrace private indecency such as involved in the present case. Our inquiry would normally end here. Given the majority's conclusion that these statutes do encompass such private behavior, however, it becomes necessary to assay them by constitutional standards. As construed by the majority, the public nuisance statutes fail to pass constitutional muster for several reasons.

First, the statutes, as interpreted today, contravene the First Amendment because they chill protected expression. As I have explained in detail elsewhere, the concept of obscenity is an inherently vague one, and no legislative or judicial efforts that even arguably comport with the First Amendment could define the term with sufficient precision to enable business persons confidently to determine whether their products or exhibitions would be ruled obscene. (Bloom v. Municipal Court (1976) ___ Cal.3d ___ (Tobriner, J., dissenting).) The problem of defining obscenity is intractable because we have no community view of that which appeals to the prurient interest and lacks social value, but rather a host of distinct views within each community.

And even if these distinct views could be said to metaphysically coalesce to form some community standard, no trier of fact could confidently ascertain what that standard was.

The determination by a judge or juror that an exhibition is obscene, consequently, amounts to nothing more than a testament to his subjective preferences or a conjecture about the taste and fancy of his neighbors. As the Court of Appeal acknowledged in In re Davis (1966) 242 Cal.App.2d 645, 661, when it held a law proscribing "any act which openly outrages public decency" impermissibly vague, "(t)he constitution . . . could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury. . . ."

Although we do not deal here with a criminal law, the vice of vagueness remains fatal. The United States Supreme Court explained: "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech and of the press suffer." (Ashton v. Kentucky (1966) 384 U.S. 195, 200.) The essential inquiry, then, is whether the vaguely crafted law will discourage

protected speech. There can be no doubt that the use of the public nuisance statutes to suppress obscenity will throttle expression which would not be adjudged obscene.

Vague criminal laws chill protected expression because some people, reluctant to risk criminal penalties, refuse to deal with any materials or engage in any expression that might be deemed unprotected by First Amendment. The use of the public nuisance laws to regulate obscenity will also entail the suppression of protected materials because of the awesome risks associated with being branded a public nuisance. The majority empowers the trial court to decide whether it should "close the premises entirely or enjoin further 'obscene' exhibitions regarding materials not yet adjudged obscene." A prudent business person is not likely to exhibit material that he thought was protected by the First Amendment when, if a particular judge disagreed with him,6/

6/ The fact that the public nuisance statutes relegate the decision to a judge, rather than to a jury, exacerbates the chilling effect. A dealer in protected material who might have been confident that no group of 12 jurors would unanimously conclude that his material offended the community standards might find himself inhibited by the greater uncertainty of how a single member of the community -- the judge -- would react to it.

he might have to endure not merely the suppression of that material, but the closing of his place of business.

The spectre of the application of these severe remedies, when combined with the inherent uncertainty as to that which constitutes obscenity, will thus entail a genre of private censorship as repugnant to the values underlying the First Amendment as censorship by the state itself. It will "tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." (Smith v. California (1959) 361 U.S. 147, 153-154.) Any law that attempts to regulate the exhibition or sale of obscene material to consenting adults will necessarily beget this noxious private censorship to some degree.

The public nuisance laws, as enlarged by the majority, suffer from a second constitutional infirmity: they constitute an illegal prior restraint of expression. In the present case, the plaintiffs entreat the trial court not only

to enjoin the sale or exhibition of materials actually adjudged obscene, but to forbid the sale or exhibition of other materials prior to any determination that they are obscene. Moreover, they urge the trial court to close down a business -- and thereby suppress all materials that the business would have sold or exhibited -- if the court finds that the business has in the past sold or exhibited some obscene material. The majority, by refusing to foreclose these remedies, sanctions the subversion of a cardinal tenent of First Amendment doctrine: materials are presumptively protected by the First Amendment and their sale or exhibition will not ordinarily be suppressed prior to a final determination that, in fact, they are unprotected.

Although the United States Supreme Court has never declared prior restraints unconstitutional per se, it has acknowledged that a system of prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity." (Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 70.) As that high court has explained: "The presumption against prior restraints is heavier -- and the degree of protection broader -- than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory etched deeply in our

law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 558-559.)

That prior restraints are antithetical to the values emobdied in the First Amendment is rendered clear by the facts of one of the cases decided today, People ex rel. Busch v. Jason's Books. The bookstore involved sells thousands of books and magazines, and the plaintiffs only allege that 30 percent of the books and 20 percent of the magazines are "hardcore." Presumably, 70 percent of the books and 80 percent of the magazines are not obscene and, therefore, are protected by the First Amendment. Yet the majority would permit a trial court to close down the entire bookstore and thereby suppress the bulk of the publications sold there, notwithstanding the fact that no one alleges that they are obscene. And even if the trial court judiciously refrains from closing the bookstore entirely, the majority permits it to enjoin the

sale of particular books or magazines prior to any pronouncement upon their obscenity or social worth.

Because prior restraints critically endanger free expression, they will survive constitutional scrutiny only when they occur "under procedural safeguards designed to obviate the dangers of a censorship system." (Southeastern Promotions, Ltd., supra, at p. 559.) In Southeastern Promotions, the court reaffirmed its ruling in Freedman v. Maryland (1965) 380 U.S. 51, 58, that a prior restraint on expression is constitutionally defective unless it is "imposed only for a specified brief period and only for the purpose of preserving the status quo" pending a final judicial pronouncement on the material's obscenity. (420 U.S. at p. 560.) The public nuisance laws provide no such guarantees.

In the present cases the complaints urged the court to close the premises for one year. While the time period is specified, it cannot reasonably be deemed brief. Moreover, the request for such relief is not based upon the need to preserve the status quo pending adjudication of the obscenity of the other materials. Indeed, as I observed above, there is absolutely no allegation that certain of the materials that would be suppressed are obscene. And even if

the trial court enjoined the sale of only those materials that were allegedly obscene, there is no guarantee of the prompt final judicial determination of obscenity that the federal cases require. In sum, prior restraints such as the plaintiffs seek and the majority permits are blatantly unconstitutional because they are unaccompanied by those specific procedural safeguards that the United States Supreme Court has held necessary to overcome the presumed illegality of prior restraints. 7/

That the public nuisance statutes do not provide such procedural safeguards should not be surprising. As I have argued above, they simply were not drafted for the purpose to which the majority commits them. The sword of public nuisance is a blunt one, admirably designed to

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7/ The majority circumvents another procedural problem by importing to the statutes a requirement of a prior adversary hearing. The majority justifies this judicial rewriting of the statute by referring to the principle that laws should be construed so as to uphold their validity. There is, however, an alternative way to construe the statutes involved in this case so as to render them immune to constitutional attack: they can be interpreted as inapplicable to private behavior. Given that the applicability of the statute's language to private behavior is, at best, highly dubious, this reading would seem the more judicious way to construe the statute so as to uphold its validity.

curb noxious odors or to quell riots, but ill suited to the delicate sphere of the First Amendment where legal overkill is fatal.

Because the public nuisance statutes do not govern the willful viewing of obscene material in private by adults -- and because if they did they would be constitutionally defective -- I conclude that the trial court properly sustained the defendant's demurrer. Accordingly, I would affirm the decision below.

TOBRINER, J.

WE CONCUR:

Wright, C.J.
Mosk, J.